IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1331 of 2003
IN
SPECIAL CIVIL APPLICATION No 10526 of 2003
WITH
LETTERS PATENT APPEAL No 1332 of 2003
IN
SPECIAL CIVIL APPLICATION No 10524 of 2003

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT
and
HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NAVPAD TEXTILE INDUSTRIES LTD. & OTHERS
Versus
SURAT PEOPLE'S CO-OPERATIVE BANK LTD.

Appearance:
1. LETTERS PATENT APPEALS Nos. 1331, 1332 of 2003
MR MIHIR JOSHI, SENIOR ADVOCATE WITH
MR ANSHIN H DESAI for Appellants.
MR IJ DESAI for Respondent No. 1
MR NV ANJARIA for Respondent No. 1

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
and
HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 30/12/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MISS JUSTICE R.M.DOSHIT)

The appellants in these appeals challenge the judgment and order dated 5th December, 2003 passed by the learned Single Judge in Special Civil Applications Nos. 10526 of 2003 and 10524 of 2003. By impugned judgment, the writ petitions preferred by the appellants against the notice issued by the respondent Surat People's Co-operative Bank Limited (hereinafter referred to as 'the Bank') under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act') have been dismissed.

The only contention that is raised before us is in respect of the authority of the Bank to invoke Section 13 (2) of the Act without seeking consent of the other secured creditors as envisaged by Sub-Section (9) of section 13 of the Act. Section 13 of the Act empowers the secured creditor to enforce the security without the intervention of the Court or Tribunal, to recover its dues. Sub-section (2) thereof provides for notice by the secured creditor to the borrower to discharge in full his liability to the secured creditor within sixty days from the date of notice. Sub-section (9) of Section 13 reads as under :-

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured asset shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debts under proviso to sub-section (1) of Section 529 of the Companies Act, 1956, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator.

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Mr. Mihir Joshi has submitted that sub-section (9) envisages consent of other secured creditors representing not less than three-fourth in value of the amount outstanding as on the record date. He has submitted that in the present case, the Bank has failed to secure consent of the other secured creditors. Hence, the action of the Bank in issuing notice under sub-section (2) of Section 13 without previous approval of the other secured creditors is void-ab-initio and requires to be quashed and set aside. He has submitted that this issue has not been decided by the Hon'ble Supreme Court in the matter of Mardia Chemicals Ltd. and Others V/s. Union of India and others [(2004) 4 Supreme Court Cases 311]. The issue is, therefore, res integra. He has submitted that the words "the secured creditors

representing not less than three-fourth in value of the amount outstanding" appearing in the above referred sub-section (9) necessarily refers to the total outstanding dues of the borrower. He has submitted that in the present cases, the total dues of the borrower is much larger than the debts due to the Bank. There are other secured creditors. Hence, the Bank was required to follow the aforesaid procedure which is mandatory. He has further submitted that in the event this Court takes the view that the above referred words do not refer to the total outstanding dues of the borrower, but relates to the outstanding dues against the secured assets; in that case, in respect of the secured assets, there are other secured creditors who have a second charge or a third charge over the secured assets. Hence, the Bank was required to take approval of such other secured creditors as envisaged by above referred sub-section (9).

The appeal is contested by learned advocate Mr. Desai. He has submitted that the construction put by Mr. Joshi cannot be accepted. So far as the present cases are concerned with respect to the secured assets, the Bank is the only secured creditor. The provisions of sub-section (9), therefore, are not attracted. He has also invited our attention to the amendment made to the Act by Ordinance No. 5 of 2004. He has submitted that in case there were any doubt, the aforesaid amendments particularly the amendment made to Section 17 of the Act leave no manner of doubt that the only remedy the petitioners can have is against the action taken under sub-section (4) of Section 13 of the Act and challenge to the notice given under sub-section (2) of Section 13 is not maintainable.

Mr. Desai has relied upon the judgments of this Court in the matter of Apex Electricals Ltd. & Ors. V/s. I.C.I.C.I. Bank Ltd. & Ors., [2003 (2) G.L.R. 1785] and in the matter of Kheralu Nagarik Sahakari Bank Ltd., V/s. State of Gujarat [1998 (2) G.L.R. 1517] and the judgment of the Hon'ble Supreme Court in the matter of Mardia Chemicals Ltd. and Others V/s. Union of India and others [(2004) 4 Supreme Court Cases 311].

We are unable to agree with Mr. Joshi. The learned Single Judge has succinctly dealt with the matter at issue. Sub-section (9) of Section 13 of the Act contemplates a situation where the right under Section 13 (4) is to be enforced by a group of more than one creditor, more than one secured creditor as mentioned in section 13(9) of the Act or by a consortium of creditors. In other words, the said provision would be attracted

only in cases where financing of an asset is by more than one secured creditor acting jointly or simultaneously or by a consortium of creditors. It shall not be attracted where a financial assistance has been extended by an individual secured creditor. We see no reason to take any other view of the aforesaid provisions.

Further, in case where consent of the other secured creditors as envisaged by Sub-section (9) of Section 13 of the Act is required, such consent would be required before proceeding to take over possession of the Secured assets of the borrower or the management of such Secured assets or taking any other action as envisaged by Sub-section (4) of Section 13 of the Act. The consent envisaged by Sub-section (9) of Section 13 of the Act would not be required at the time of issuing notice under Sub-section (2) of Section 13 of the Act.

No other contention is raised before us. The appeals are dismissed with cost. Interim relief stands vacated. Registry shall maintain copy of this judgment in each appeal.

Sd/-

[MISS R.M. DOSHIT, J.]

Sd/-

[K.A. PUJ, J.]

#Savariya#